

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student v. Melrose Public Schools

BSEA # 2205685

RULING ON MELROSE PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT

This Errata is being issued following the issuance of the November 22, 2022 *Ruling on Melrose Public Schools' Motion for Summary Judgment (Initial Ruling)*. On November 22, 2022, via email, Parents indicated to the Hearing Officer that she had erred in Paragraph 19 of the **PROCEDURAL HISTORY AND RELEVANT FACTS** section therein.¹ As the error results in substantive changes to the Hearing Officer's legal conclusions, this Errata is being issued.

This matter comes before the Hearing Officer on *Melrose Public Schools' Motion for Summary Judgment (Motion)*² filed on November 18, 2022. Melrose Public Schools (Melrose or the District) asserts that there is no genuine issue of material fact regarding Issue Nos. 1, 2, 3 and 5 as identified by the Hearing Officer³, and hence Summary Judgment should be allowed with respect to these three issues. On November 18, 2022, Parents responded via email⁴ in opposition to the District's *Motion*.

Neither party has requested a hearing on its motions. Because neither testimony nor oral argument would advance the Hearing Officer's understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*.

For the reasons set forth below, the District's *Motion* is hereby DENIED, in part, and ALLOWED, in part.

ISSUES:

The following issues are addressed in this Ruling:

ISSUE A: Whether disputed issues of material fact exist as to Parents' notice of their "stay-put right" or whether Parents' claims prior to January 18, 2020 must be denied as a matter of law;

¹ Specifically, Paragraph 19 indicates that Parent had written an email to the District on November 13, 2022. The date of the email was, in fact, September 14, 2020. (P-E-Issue 2)

² In reality this was a Motion for *Partial* Summary Judgment, as judgment was only sought with respect to 3 of the issues presented in the Hearing Request.

³ These are delineated as ISSUES A, B, and C, respectively, in the ISSUES section, *supra*. ISSUE B herein incorporates Issues 2 and 3 as delineated by the Hearing Officer and the parties.

⁴ The Hearing Officer takes Parents' emails dated November 18, 2022 as their objection to the *Motion*.

ISSUE B: Whether there is any genuine issue of material fact surrounding the acceptance and implementation of the Individualized Education Program (IEP) dated February 12, 2020 to February 11, 2021 (2020-2021 IEP) and/or the acceptance of the IEP dated February 10, 2022 to February 9, 2023 (2022-2023 IEP) and, if not, Parents' claims as to these IEPs must be denied as a matter of law; and,

ISSUE C: Whether there is any genuine issue of material fact surrounding the provision of the compensatory services ordered by Department of Elementary and Secondary Education (DESE) such that Parents' claim that they were "delayed a bit" is of no matter, and Parents' claims relative thereto must be denied as a matter of law.

PROCEDURAL HISTORY AND RELEVANT FACTS:

The following facts are not in dispute and are derived from the Hearing Request, Amended Request for Hearing, Melrose's responses thereto, the District's *Motion* with supporting *Memorandum* and exhibits (S-A to S-I), as well as Parents' emails dated November 18, 2022 and attached Exhibits, titled P-E-Issue 1, P-E-Issue 2, P- E-Issue 5, and P-E-Audio.

1. Student is an 8th grade student who is receiving special education services pursuant to the Neurological Disability category. (Response)
2. Student was found eligible for special education and related services in the second grade (2016-2017) pursuant to the Developmentally Delayed disability category. (Hearing Request)
3. On or about February 6, 2019, the Student's IEP Team convened to review the District's three-year re-evaluations and to consider eligibility for special education services. During that meeting, the Team found Student ineligible for special education and related services. At the conclusion of the meeting, the Parents were provided a copy of the Parent's Notice of Procedural Safeguards (a publication developed by DESE). Parents acknowledged receipt of the Notice of Procedural Safeguards by signature, dated February 6, 2019 on the Team Meeting Summary. (S-A, S-B)
4. On pages six and seven of the Parent's Notice of Procedural Safeguards, parents are notified of their rights when parents and school districts, "disagree about changes relating to the identification, evaluation, or educational placement of a student with a disability, or the FAPE services provided to a student with a disability." Page seven of the Parent's Notice of Procedural Safeguards states, in part, "Your student shall remain in his or her current education program and placement during any dispute regarding placement or services" (S-C)
5. On Friday, February 8, 2019, Parent wrote to the District as follows:
"So yesterday I sent [] an email regarding reconvening [Student's] IEP meeting and hopefully as soon as possible but I haven't heard anything back from her. [Student's] Doctor did not agree with the ADHD assessment/ diagnosis that the school Psychologist suggested. My doctor set me up with an appointment to see a Nueropsychologist[sic]. In the mean time [sic]I want to make sure [Student] will continue to receive

services? If you could pass on the message that I would like to meet with everyone hopefully next week.” (P-E-Issue 1)

6. On February 13, 2019, Parent again emailed the District:

“Just wanted to touch base before the February break. I was waiting to hear back from you at the beginning of this week like you said about reconvening our meeting but unfortunately haven't heard anything. I also left a message for you and Ms. [] this morning, she did get back to me and I did speak with her but there are several questions I have for you that need to be addressed. One is since the Nuerologist [sic] didn't come to the same conclusion as the school, I'm curious as to why [Student] wouldn't be qualified for services under several other areas, like for example Dysgraphia. That is under Specific Learning Disability and his below average scores in that area support that. The other thing I'm curious about is not being told [prior to] his 2019 meeting that [Student's] services would expire after 9 and could no longer be associated under a Developmental Delay. I should have been made aware of this removal of services in advance but instead I'm being told ... to now Doctor shop to get some other diagnosis. My child needs help and support to make it through the rest of the year and future. I'm very disappointed with the way this has been proposed. I wish to reconvene with everyone as soon as possible, if you could get back to me with the nearest date that would be helpful.” (P-E-Issue 1)
7. On February 16, 2019, the District issued an N2 stating, in part:

“After discussion, the TEAM including [Student's] mother, determined that [Student] does not continue to qualify for special education services under the disability of developmental delay, since he is currently age 9 and will be 10 in March. Based on the evaluation and classroom performance, [Student] appears to present with elevated levels of inattention, hyperactivity, impulsivity, learning problems and executive functioning concerns; however, these areas do not appear to be of concern outside of school. Because the elevated levels did not appear to be present across two domains, it was not possible to determine a disability category for [Student]. [Student's] mother was advised to take the reports to her pediatrician. No rejected options were considered and no other factors were relevant to the school district's decision. [Student's] mother was satisfied with the school evaluation. At this point, there are no additional steps needed. If there is new information regarding [Student], the team will reconvene. If you have any questions, please do not hesitate to contact me.” (S-D)
8. In the following school year, on January 20, 2020, Parent wrote to Melrose as follows:

“[M]y son is a fifth grade student at the Hoover school. I have some extreme concerns at the process that has taken place of removing my son unlawfully from his IEP at the end of last year. It was stated that he needs to have more testing done outside school and I've just now completed. My son should never have been removed from support while I pursued testing. The 'stay[-]put' provision is in place for this exact situation but no one

informed me of this law at the Hoover school. Thankfully my son was properly tested by Gretchen Timmel and the significant findings should have been easily detected by the Hoover school. I would like my [son's] IEP reinstated while we wait for the report from Gretchen to be completed. My son doesn't deserve to be left hanging any longer from the Hoover school. Please let me know if you can help me. We have an IEP meeting January 29.” (S-E)

9. The Team convened in February 2020. At that meeting, Parents stated that at the time that Student was removed from his IEP, they were unaware that “he could stay on his IEP,” and that the District could have “told [Parents] at that meeting he could stay[-]put but [the District] told [them] to go get a diagnosis.” The then-presiding Team Chair “apologize[d]” to Parents, stating, “A person in my role is responsible for ensuring that you as parents know what your rights are.” She indicated that at the 2019 meeting, the then-coordinator had gone through the “flowchart but did not explain [Parents’] rights when a student is found ineligible and [she] apologize[d] for that” as the “coordinator [at the January 2019 meeting] should have explained” it; “Parents should have been informed they can disagree with the finding and then [the Team] would convene and talk about next steps.... [Parents] should have been informed of that part of [their] rights.” (P-E-Audio)
10. Student was found eligible in February 2020 under the disability category Neurological Impairment. The District proposed the 2020-2021 IEP with goals and services in the areas of Mathematics, Reading, and Written Language. The District proposed a partial inclusion placement for same period. (S-E)
11. On June 22, 2020, Parent emailed the District as follows:

“After carefully reading over the proposed IEP for [Student], we are in agreement with what is proposed. As a team member [i]t has to be clarified what was said in our last IEP meeting that we conducted over the phone. You explained some of my concerns but left out how I had to hire a dyslexia tutor for [Student] and I had to choose that over remote learning. I explained my son needs to learn to read properly to be able to progress to another grade level. Even though the remote learning was modified as best as [i]t could be, [Student] was still not able to do both. That was the choice I had to make for my son and we chose to concentrate on learning to read properly. If you could add what I said in our conference that would be helpful, because the picture you painted [i]s that you modified the work and we just chose not to do [i]t and that's not at all what's happened in this situation.” (S-F)
12. On September 14, 2020,⁵ Parent wrote to Melrose as follows:

“In my spring end of the year IEP meeting I spoke with [] about not having [Student] enter the sixth grade unless he would be taught by a teacher certified in either Orton Gillingham or Wilson. [] said they have a teacher in Middle school, so I agreed. Gretchen Timmel, our Neuropsych [sic] was very specific in her report about [Student]. She states, that [Student] needs a teacher ‘certified’ in one of these programs. I’ve

⁵ The Initial Ruling erroneously indicated that this communication was made on November 13, 2022, and as a result, I have stricken Paragraph 19 of the FACTS section contained in the Initial Ruling.

contacted [], and she is not certified in Orton Gillingham. This is not acceptable for [Student], and I do not agree to the IEP. If we could move quickly to meet about [Student's] IEP because it's not what I agreed to and it must be changed. School is starting and he cannot participate in remote learning. He is more than qualified to be in group C. As [] explained that this group of children have different disabilities and in her words some with 'cognitive issues' well dyslexia is very much a cognitive disability! When school is in starting session we should be able to meet also. Please let me know what date will work." (P-E-Issue 2)

13. On October 14, 2020, Parent filed a complaint with DESE, alleging that Melrose did not fully implement Student's 2019-2020 and 2020-2021 IEPs. On December 14, 2020, DESE concluded that Melrose did not fully implement Student's agreed upon IEP during the 2019-2020 and 2020-2021 school years, and instructed the District to develop a Compensatory Services Plan with Parents by January 15, 2021. (S-G)
14. Because the parties could not agree on a compensatory services plan, on April 5, 2021, DESE issued an Order of Compensatory Services that denied the Parents' proposal for one hundred and ninety (190) hours of compensatory services and instead concluded the District owed the Student four hours of Reading service, five and one half hours of Math service, and five and one half hours of ELA service. (S-H) DESE's Order of Compensatory Services did not set forth a date by which the compensatory services were to be provided. (S-H) On April 14, 2021, DESE wrote, "Please note, the Department did not require specific personnel for implementation beyond what was listed in the student's IEP." (P-E-Issue 5)
15. On June 23, 2021, the District wrote to Parents informing them that a tutor had been identified for the compensatory services ordered by DESE. (S-5) On August 24, 2021, DESE wrote to the District to inquire about details around the corrective action as Parent had "communicated with the Department recently with regard to her dissatisfaction with the provision of compensatory services and has claimed that the District has not met its obligation." (P-E-Issue 5) Parents and the District attempted to negotiate a compensatory service agreement. (P-E-Issue 5) According to Parents, "The school did provide the ordered [compensatory] hours owed. It was delayed a bit, but they provided the compensatory hours ordered by DESE." (S-B)
16. On January 19, 2022, Parents⁶ filed a Request for Hearing alleging that Student was improperly removed from an IEP during the spring of his fourth grade year (2018-2019), and that the Parents were unaware of their right to claim "stay-put" services at that time; that, to date, Student has not been provided with needed Orton-Gillingham reading services; that Student was owed compensatory services due to a "schedule" during the 2021-2022 school year that resulted in a reduction of services; and that Student should be placed at Landmark School "or an equivalent school setting that will help bridge [Student's] 6 year gap in learning." (Hearing Request)
17. In February 2022, Melrose proposed the 2022-2023 IEP with goals and services in the areas of Mathematics, Reading, Written Language and Academic Support. On March 31, 2022, Parents fully accepted the IEP and partial inclusion placement. (S-I)

⁶ At that time, Parents were represented by an attorney.

18. On September 12, 2022, Parents filed an Amended Request for Hearing⁷ in which they asserted, in part, that the IEPs developed by the District in February 2020 and thereafter were not reasonably calculated to provide Student with a FAPE and that accepted IEPs had not been implemented. (Amended Request for Hearing)
19. On September 16, 2022, I denied Melrose’s Motion to Dismiss as to any claims which occurred prior to January 18, 2020 as Parents had alleged that they had not been provided with their Notice of Procedural Safeguards.
20. On November 18, 2022, the Hearing Officer identified the following issues for Hearing based on the pleadings:
 1. Whether Melrose failed to provide Parents with a copy of IDEA procedural safeguards informing them of Student’s stay-put rights when proposing to remove Student from his IEP in February 2019?
 - a. If the Answer to (1) is yes, whether Melrose erred when finding Student no longer eligible for special education and related services in February 2019?
 - b. If the answer to (1) is yes, whether the District identified, located, and evaluated the Student between 1/2019 and 2/2020?⁸
 2. Whether the 2020-2021 IEP⁹ and the 2022-2023 IEP were/are reasonably calculated to offer Student a FAPE in the LRE?¹⁰
 3. Whether Melrose failed to implement Student’s then-current IEP from February 2020 through the conclusion of the 2020-2021 school year?¹¹
 4. Whether Student failed to make progress during the COVID-19 shutdown (from March 2020 until October 2020) such that he required COVID-19 compensatory services?
 5. Whether the District was untimely in providing Student with the compensatory services identified by DESE as owing to Student?¹²
 6. If the answer to any of the above is yes, what is the appropriate remedy?

LEGAL STANDARDS:

A. *Jurisdiction of the Bureau of Special Education Appeals (BSEA)*

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA) jurisdiction over timely complaints filed by a parent/guardian or a school district “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”¹³ In Massachusetts, a parent or a school district, “may request mediation and/or a hearing at any time on any matter¹⁴ concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with

⁷ At that time, Parents were *pro se*.

⁸ This is delineated as Issue A in this Ruling, *supra*.

⁹ Based on email communications from Counsel for Melrose, this IEP was revised in October 2020.

¹⁰ This is incorporated into Issue B in this Ruling, *supra*.

¹¹ This is incorporated into Issue B in this Ruling, *supra*.

¹² This is delineated Issue C in this Ruling, *supra*.

¹³ See 34 C.F.R. §300.507(a)(1).

¹⁴ Limited exceptions exist that do not apply here.

disabilities.”¹⁵ Nevertheless, it is well established that matters that come before the BSEA must involve a live or current dispute between the parties.¹⁶ In addition, the BSEA “can only grant relief that is authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services.”¹⁷

B. Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.”¹⁸ In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56 of the Federal and Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.”¹⁹ A genuine dispute as to a material fact exists if a fact that “carries with it the potential to affect the outcome of the suit” is disputed such that “a reasonable [fact-finder] could resolve the point in the favor of the non-moving party.”²⁰ The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.²¹

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”²² To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.²³ In other words, the evidence presented by the non-moving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”²⁴ The non-moving party’s evidence will not suffice if it is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation.”²⁵

Thus, to analyze whether the party moving for summary judgment has met its initial burden such that the burden shifts to the opposing party, I must view all the evidence the District has submitted in the light most favorable to the opposing party and determine that there is no genuine

¹⁵ 603 CMR 28.08(3)(a).

¹⁶ See, e.g., *In Re : Student v. Bay Path Reg'l Vocational Tech. High Sch.*, BSEA # 18-05746 (Figueroa, 2018).

¹⁷ *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

¹⁸ 801 CMR 1.01(7)(h).

¹⁹ *Id.*

²⁰ *French v. Merrill*, 15 F.4th 116, 123 (1st Cir. 2021); see *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994).

²¹ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986); see *In Re: Westwood Pub. Sch.*, BSEA No. 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Pub. Sch.*, BSEA No. 10-2417 (Oliver, 2010); *Zelda v. Bridgewater-Raynham Pub. Sch. and Bristol County Agricultural Sch.*, BSEA No. 06-0256 (Byrne, 2006).

²² *Anderson*, 477 U.S. at 250.

²³ *Id.* at 249.

²⁴ *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989).

²⁵ *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

issue of material fact related to the claims before me. Only if the moving party is successful in this first step does the burden then shift to the opposing party.

In the instant matter, therefore, to decide as to Melrose's *Motion for Summary Judgment*, I must first determine whether disputed issues of material fact exist as to Parents' notice of their "stay-put right" or whether, as a matter of law, Parents' claims prior to January 18, 2020 must be denied; whether there is any genuine issue of material fact surrounding the acceptance of the 2020-2021 IEP and the 2022-2023 IEP, and, if not, whether as a matter of law, Parents' claims as to these IEPs must be denied; and, whether there is any genuine issue of material fact surrounding the provision of the compensatory services ordered by DESE such that Parents' claim that they were "delayed a bit" is immaterial, and Parents' claims relative thereto must be denied as a matter of law.

DISCUSSION:

1. No Disputed Issue Of Material Fact Exists As To Parents' Receipt Of Procedural Safeguards; Parents' Claims Prior To January 18, 2020 Must Be Denied As A Matter Of Law.

The District argues that there is no dispute that Parents received their procedural safeguards when Student was found ineligible for special education in February 2019. Therefore, the District argues that as Parents' Hearing Request was not filed until January 18, 2022, a matter of law, Parents' claims prior to January 18, 2020 must be denied as they are beyond the IDEA's two year statute of limitations. In response, Parents assert that they were unaware of the stay-put provision (as were District staff who acknowledged that this right was not explained to Parents at the time that Student was found ineligible), and hence the IDEA's two-year statute of limitations should not apply. (S-E, P-E-Audio)

The IDEA's two-year statute of limitations does not apply if a district withheld "information from [Parents] that was required under this subchapter to be provided to [them]."²⁶ 603 CMR 28.05(2)(a)(2) provides that where "the Team determines that the student is not eligible [for an IEP], the Team chairperson shall record the reason for such finding, list the meeting participants, and provide written notice to the parent of their rights in accordance with federal requirements within ten days of the Team meeting."²⁷ The procedural safeguards notice must include a full explanation of IDEA procedural safeguards, including, but not limited to, the opportunity to present and resolve complaints through the due process complaint and state complaint

²⁶ 20 USC § 1415(f)(3).

²⁷ See also *Administrative Advisory SPED 2001-4* ("Neither former regulations nor current regulations require written consent from a parent when the district makes a Finding of No Eligibility. The district must provide full written notice, however, when informing the parent of such a Finding. The parent, if he or she disagrees with the Finding, has the right to appeal the school district's Finding of No Eligibility to the Bureau of Special Education Appeals (BSEA), or to use other dispute resolution mechanisms such as mediation or the Problem Resolution System (PRS) of the Department of Elementary and Secondary Education. When the Team makes a Finding of No Eligibility for a student who has been receiving special education services, the school district must continue to provide services if the parent disagrees with this Finding and appeals to the BSEA").

procedures, availability of mediation, and the student's placement during pendency of due process proceedings.²⁸

Therefore, in order to meet the IDEA's above-quoted part D(ii) exception to the statute of limitations, Parents must demonstrate: first, that Melrose withheld information it was required to provide under 20 USC § 1411 through § 1419, part B of the federal special education statute; and second, that "parent was prevented from requesting the [due process] hearing due to [Melrose's] withholding the required information." Both prongs must be satisfied for the statute of limitations exception to apply. In considering this exception to the statute of limitations, courts have found that failure to provide this notice of procedural safeguards implicates both requirements of this exception, since the notice of procedural safeguards must, specifically, include information that advises Parents of their right to obtain a due process hearing and thereby contest a school district's actions.²⁹ With regard to the statute of limitations,

“when a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA. Conversely, in the absence of some other source of IDEA information, a local educational agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights.”³⁰

Districts must provide the parents of a child with a disability with notice of the procedural safeguards under IDEA.³¹ This notice must be provided once every year, except that a copy must also be provided upon initial referral or parental request for evaluation; upon receipt of the first state complaint in the school year; upon receipt of the first due process complaint in the school year; in accordance with disciplinary procedures; and upon parental request.³²

Here, Parents indisputably received a copy of the DESE-developed Parent's Notice of Procedural Safeguards at the conclusion of the IEP Team meeting on February 6, 2019, and again on

²⁸ See 34 CFR 300.504(c); see also *Administrative Advisory SPED 2001-4* (“Forms N 1 and N 2 must be mailed with a Parents' Rights Brochure to meet federal requirements. The Parents' Rights Brochure contains contact information for both the BSEA and the PRS”).

²⁹ See, e.g., *J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, 2009 WL 1119608, *13 (W.D.Pa. 2009) (finding that the school district's failure to provide the requisite notice of procedural safeguards tolled the statute of limitations); *Sch. Dist. of Philadelphia v. Deborah A.*, 2009 WL 778321, *4 -5 (E.D.Pa. 2009) (focusing on the issue of whether the school district provided the requisite notice of procedural safeguards); *El Paso Independent Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D.Tex. 2008) (“When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance.”); *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, 2008 WL 4791634, *7 (E.D.Pa. 2008) (“second exception to the limitation period provided by 20 U.S.C. § 1415(f)(3)(D) refers solely to the withholding of information regarding the procedural safeguards available to a parent under that subchapter”).

³⁰ *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008).

³¹ 34 CFR 300.504 (a).

³² 34 CFR 300.504 (a); 71 Fed. Reg. 46,692 (2006); see also *Administrative Advisory SPED 2001-4: Finding of No Eligibility for Special Education* which may be found at https://www.doe.mass.edu/sped/advisories/01_4.html.

February 16, 2019, which Notice informed them of both their right to stay-put and the dispute resolution process. (S-B, S-C, S-D) In addition, on February 8, 2019, Parent in fact invoked stay-put rights by stating in an email, “In the mean time [sic] I want to make sure [Student] will continue to receive services? If you could pass on the message that I would like to meet with everyone hopefully next week.” (P-E-1) On February 13, 2019, Parent again requested “to reconvene with everyone as soon as possible.” (PE-1) Based on the submitted exhibits, I cannot find that the District failed to provide Parents with their procedural safeguards informing them of their rights following a finding of ineligibility.³³ (P-E-Audio) As no disputed issues of material fact exist as to Parents’ notice of their “stay-put right”, Parents’ claims prior to January 18, 2020 must be denied as a matter of law.³⁴ Hence, summary judgment is ordered as to ISSUE A, *supra*, and Issue No. 1, inclusive of (a) and (b).³⁵

2. There Is A Genuine Issue Of Material Fact Surrounding The Appropriateness of the 2020-2021 Such That the District is Not Entitled to Judgment As A Matter Of Law.

Parents challenge the appropriateness of the 2020-2021 IEP. (Hearing Request, Amended Hearing Request) The District argues that Parents are precluded from challenging a fully accepted, expired IEP. Moreover, any implementation failures relating to said IEP were addressed by DESE and corrected by the District.

³³ Parents assert that they did not understand their stay-put rights and could not “find it” in the Notice of Procedural Safeguards. (P-E-Audio) Moreover, District staff acknowledged that the then-Team chair did not explain such right to Parents at the meeting. (P-E-Audio) Nevertheless, the District is not charged with reviewing Parents’ procedural safeguards to check for understanding. While 34 C.F.R. § 300.322(e) states that the “public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English,” this regulation specifically refers to parents who have communication difficulties or who speak a language other than English. See *Colonial Sch. Dist. v. G.K.*, 763 F. App’x 192, 198 (3d Cir. 2019) (“Applying *noscitur a sociis*, the broad phrase “whatever action is necessary” should be interpreted by considering the more specific example that follows (i.e., provision of interpreters for deaf or non-English-speaking parents). Taken in context, Section 300.322(e) ensures that parents can attend and receive information about IEP meetings—with translation or similar assistance if necessary to accommodate families with English language or other communicative difficulties—so that they may understand what is happening in the meeting. These are procedural safeguards rather than a substantive guarantee that parents must fully comprehend and appreciate to their satisfaction all of the pedagogical purposes in the IEP”).

³⁴ As Parents invoked stay-put rights on February 8, 2019, the District clearly erred in not maintaining Student’s services thereafter. However, Parents were in receipt of their procedural safeguards and failed to file with the BSEA to enforce their rights. Because such claims are beyond the statute of limitations, they may no longer be pursued. See, e.g., *Gregory M. v. State Bd. of Educ. of the State of Conn.*, 23 IDELR 1 (D. Conn. 1995) (finding that a district official properly checked a box on a document indicating that the parents received a booklet of procedural safeguards); *Conway v. Board of Educ. of Northport-E. Northport Sch. Dist.*, 67 IDELR 16 (E.D.N.Y. 2016) (The district’s records showing that it included a procedural safeguards notice with a December 2012 consent form and an April 2013 eligibility determination convinced the court that the parent had adequate notice of her right to seek relief through the IDEA’s administrative procedures.); *Columbus City Sch. Dist.*, 114 LRP 52959 (SEA OH 10/17/14) (noting that the parents’ signature on the student’s IEP, coupled with the checkmark next to a box stating that the parents received a copy of procedural safeguards, showed that the district adhered to the IDEA’s notice requirements); *Board of Educ. of the N. Rockland Cent. Sch. Dist. v. C.M.*, 72 IDELR 172 (2d Cir. 2018, *unpublished*) (noting that because a New York district had documentation showing that the mother of a student with emotional and behavioral difficulties received a copy of her procedural safeguards more than two years prior, the mother’s due process complaint was filed in an untimely manner).

³⁵ My conclusion as to Issue 1 remains unchanged from the Initial Ruling.

It is undisputed that the 2020-2021 IEP was fully accepted on June 22, 2020 (via email). It is well accepted that "once a fully accepted and implemented IEP has expired, hearing officers are precluded from re-visiting those IEPs so long as the parent had an opportunity to participate in the development of the IEP in question and received the notice of parental rights regarding IEP acceptance/rejection and dispute resolution options."³⁶ (S-F) However, on September 14, 2020, Parent wrote to Melrose as follows: "I do not agree to the IEP." (P-E-Issue 2) Hence, it appears that Parents may have rejected the IEP on said date, which was prior to the February 2021 expiration date of said IEP. Therefore, there is a genuine issue of material fact as to the reasonableness of the 2020-2021 IEP. The District is not entitled to summary judgment as to ISSUE B, *supra*, and Issue No. 2 as it relates to the 2020-2021 IEP.³⁷

3. There Is No Genuine Issue Of Material Fact Surrounding The Implementation Of the 2020-2021 IEP During the 2020-2021 School Year; As A Matter Of Law, Parents' Claims As To This IEP Must Be Denied.

Parents challenge the implementation of the 2020-2021 IEP during the 2020-2021 school year. (Hearing Request, Amended Hearing Request) The District asserts that any implementation failures relating to said IEP were addressed by DESE and corrected by the District.

Parent's Hearing Request and the delineated issues for hearing raise implementation concerns regarding the 2020-2021 IEP during the 2020-2021 school year. However, implementation of the 2020-2021 IEP could not begin prior to Parents' acceptance thereof on June, 22 2020.³⁸ The Melrose Public Schools' 2020-2021 calendar³⁹ shows June 17, 2021 as the last day of school. Therefore, there is no remaining issues of genuine fact as to the implementation of the 2020-2021 IEP during the 2020-2021 school year. The District is entitled to summary judgment as to ISSUE B, *supra*, and Issue No. 3.⁴⁰

4. There Is No Genuine Issue Of Material Fact Surrounding The Appropriateness or Implementation Of The 2022-2023 IEP, Such That the District Is Entitled to Judgment As A Matter Of Law.

The District argues that the 2022-2023 IEP has been fully accepted, and, "while it has not expired, Parents have not raised any specific issues regarding its implementation within the Parents' Request for Hearing." (S-I)

³⁶ See, e.g., *In Re: Blue Hills Regional Technical High School*, BSEA # 2008213 (Figueroa, 2020); *In Re: Student and Middleboro Public Schools Ruling on Motion for Summary Judgment*, BSEA #1908178 (Berman, 2019) (compensatory relief is not available for the periods corresponding to fully accepted, implemented, and expired IEPs); *In Re: Sudbury Public Schools*, BSEA # 05-4726 and # 05-4827 (Crane, 2005) ("the general and well-settled rule is that acceptance of an IEP precludes the Hearing Officer from considering its appropriateness").

³⁷ Based on Paragraph 12 of the FACTS section, *supra*, the conclusion I reach here is substantively different from the conclusion reached on this issue in the Initial Ruling.

³⁸ See 603 CMR 28.05(7)(b) ("[u]pon parental response to the proposed IEP and proposed placement, the school district shall implement all accepted elements of the IEP without delay").

³⁹ I take judicial notice of the 2020-2021 school calendar of the Melrose Public Schools.

⁴⁰ My conclusion as to Issue 3 remains unchanged from the Initial Ruling.

The District has shown that Parents have accepted the 2022-2023 IEP in full. (S-I) In response to the *Motion*, Parents have failed to “set forth specific facts showing that there is a genuine issue for trial.”⁴¹ Therefore, summary judgment is ALLOWED as to ISSUE B, *supra*, and Issue No. 2 relative to the 2022-2023 IEP.⁴²

5. There Is No Genuine Issue Of Material Fact That Student Was Provided With DESE’s Compensatory Services, And Parents’ Claims Must Be Denied As A Matter Of Law.

The District convincingly demonstrates that Parents have acknowledged that the DESE-ordered services were provided. (S-B). The fact that such services were neither provided within a particular timeframe nor by personnel with credentials approved by Parents is immaterial, as neither was prescribed by DESE. (P-E-Issue 5, S-G, S-H)⁴³ Accordingly, the District is entitled to summary judgment as to ISSUE C, *supra*, and Issue No. 5.⁴⁴

ORDER:

The District’s *Motion* is DENIED, in part, and ALLOWED, in part.

Specifically, summary judgment is ALLOWED as to Issue No. 1, inclusive of (a) and (b); Issue No. 2 as it relates to the 2022-2023 IEP; Issue No. 3; and Issue No. 5.

Summary judgment is DENIED as to Issue No. 2 relative to the 2020-2021 IEP.

Accordingly, the Hearing will proceed on the following issues only:

1. Whether the 2020-2021 IEP was reasonably calculated to offer Student a FAPE in the LRE?
2. Whether Student failed to make progress during the COVID-19 shutdown (from March 2020 until October 2020) such that he required COVID-19 compensatory services?
3. If the answer to either of the above is yes, what is the appropriate remedy?

So ordered,

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: November 23, 2022

⁴¹ *Anderson*, 477 U.S. at 250.

⁴² Paragraph 19 of the FACTS section of the Initial Ruling included an incorrect date for Parents’ email to the District. As I have corrected the date of the email in Paragraph 12, *supra*, I now reach a conclusion that is substantively different from the conclusion reached in the Initial Ruling.

⁴³ I note that have not Parents alleged in either the initial Hearing Request or the Amended Hearing Request that the DESE-ordered compensatory services were inappropriate for Student.

⁴⁴ My conclusion as to Issue 5 remains unchanged from the Initial Ruling.

.COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of— the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal. Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.